No. 80-1134

APR 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEAD INDUSTRIES ASSOCIATION, INC., *et al.*,

Petitioners,

—against—

RAYMOND J. DONOVAN, Secretary of Labor, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY MEMORANDUM

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April 29, 1981

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REPLY MEMORANDUM

This Memorandum is submitted by the Lead Industries Association, Inc. ("LIA") pursuant to Rule 22.5 of this Court's rules in reply to two arguments first raised in the Opposition Memorandum of the United Steelworkers of America (the "Union Respondent"), filed April 28, 1979.

The Union Respondent argues that the Secretary of Labor "has not made a showing . . . that any issue in this case should be disposed of" by granting the requested writ of *certiorari*, vacating the lower court judgment, and remanding the proceedings to OSHA. This argument overlooks the fact that the Government has acknowledged at pages 10a-12a of the

Appendix accompanying its Memorandum, dated April 17, 1981, that (i) "no data specifically addressing the feasibility of attaining the 50 ug/m^3 PEL was submitted at the original rulemaking" in this case, and (ii) "OSHA's statement of reasons to the lead standard . . . did not specify the dollar costs of compliance for . . . [the lead] industry." This admission by the Government—an admission which the Union Respondent does not contest—confirms that the agency failed to establish, on the basis of "substantial evidence in the record", that the Standard is economically feasible, as required by Section 6(b)(5) of the OSHA Act, 29 U.S.C. § 655(b)(5). LIA respectfully submits that, in these circumstances, the Court should summarily vacate the decision of the court below. *Cf. Cotton Warehouse Assoc. v. Marshall*, 101 S. Ct. 56 (1980).

The Union Respondent also argues that "whether this Court adopts the Secretary's approach . . . no proceedings would be pending in this Court upon which to grant a further stay" with respect to those parts of the lead Standard currently stayed. This contention is both irrelevant and incorrect, since manifestly OSHA has inherent authority to issue an administrative stay with respect to a portion of a standard that is the subject of ongoing rulemaking proceedings. The even simpler solution, and one that would avoid all future dispute, would be for the Court merely to extend its stay now in effect pending the completion of OSHA's supplemental rulemaking proceedings.

Conclusion

For the foregoing reasons, the Lead Industries Association, Inc. respectfully requests that its petition be granted, the lower court decision vacated, and the case remanded to OSHA for supplemental rulemaking proceedings.

Dated: April 29, 1981

Respectfully submitted,

/s/ Standish F. Medina, Jr.

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Certificate of Service

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

STANDISH F. MEDINA, JR., a member of the Bars of the State of New York and of the Supreme Court of the United States, and a member of the firm of Debevoise, Plimpton, Lyons & Gates, attorneys for Lead Industries Association, Inc., hereby affirms under penalty of perjury that he has caused copies of the within "Reply Memorandum" to be served on this date by causing three true copies thereof, securely enclosed in postage-paid envelopes, to be sent by first class mail to the persons whose names and addresses are set forth in the listing attached hereto.

/s/ Standish F. Medina, Jr.
STANDISH F. MEDINA, JR.

Dated: New York, New York
April 29, 1981

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